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Public Nuisance Claims After *ConAgra*

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PUBLIC NUISANCE CLAIMS AFTER *CONAGRA*

Steven Czak*

*This Note examines the continuing harms of lead-based paint and attempts by cities and states to hold manufacturers and distributors liable for abatement under the public nuisance doctrine. Such suits have stretched traditional conceptions of public nuisance, particularly on the threshold issue of whether pervasive lead paint in residences infringes on a common right held by the public. This Note reviews the major lead paint public nuisance cases from across the country. The plaintiffs were unsuccessful in each case for a variety of reasons until ten California counties prevailed in *People v. ConAgra* in November 2017. While subsequently reduced by the appellate court, and further reduced in a postjudgment settlement, the trial court initially awarded the plaintiffs a staggering \$1.15 billion in abatement funds. Across the six states that have adjudicated such cases, there exists a great discontinuity not only in outcome but also in the manner by which each state court reached its decision.*

*This Note proposes that future state courts follow the approach taken by the Rhode Island Supreme Court in carefully adhering to the historical boundaries of public nuisance and deferring to the legislature when the amorphous tort is used as an attempt to remedy a complex social issue. Given that no common right exists among private homeowners to be free of lead paint, as traditionally conceived under the doctrine, the claim of public nuisance is simply inapposite. *ConAgra* impermissibly expanded the bounds of public nuisance by finding a common right where none exists and should not be followed by future courts when adjudicating public nuisance claims.*

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INTRODUCTION

This famous Dutch Boy Lead of mine
 Can make this playroom fairly shine
 Let's start our painting right away
 You'll find the work is only play¹

Almost a century ago, a child may have stumbled across this poem in a coloring book published by NL Industries, Inc. (NL), once a major producer of lead products.² The pictures inside showed children sprucing up their playroom by painting with NL's Dutch Boy White Lead paint.³ The advertisement's message was apparent: use NL's lead paint products for interior painting, from walls to window sills and even cribs. As if that were not obvious enough, the coloring book also encouraged children to give an attached coupon for Dutch Boy paint to their parents.⁴

It is arguable whether NL knew at the time that its products could poison children.⁵ Today, however, there is no dispute about the life-altering harms of lead paint. Even minimal lead exposure can stunt cognitive and behavioral

1. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 541 (Ct. App. 2017) (quoting NL Industries, Inc.'s 1929 "paint book" for children).

2. *See id.*

3. *Id.*

4. *Id.*

5. *See id.* at 533–34.

development in children and can lead to a host of ailments in both children and adults.⁶ In 2012, the Centers for Disease Control and Prevention (CDC) changed its benchmark “level of concern”—then at ten micrograms per deciliter of lead in the blood—to a “reference value” of five micrograms because “no safe blood level . . . has been identified.”⁷ Concurrently, the CDC shifted toward a policy of “primary prevention” for lead exposure, which encourages removing hazards before they can manifest into harms, as opposed to simply mitigating the harms by covering up the lead paint with new paint.⁸ Despite a federal ban on lead paint in 1978,⁹ millions of homes across the United States still contain the deadly toxin.¹⁰ At least four million children live in these homes today, with at least half a million of those between the ages of one and five experiencing blood lead levels that exceed the CDC’s threshold for recommending public health actions.¹¹ For a product banned almost half a century ago, the dangers of residential lead paint remain substantial.

Given the pervasiveness of the problem and the abatement costs borne by communities, a number of cities and states began bringing public nuisance suits in the early 2000s against lead paint producers for their promotion and creation of a public harm.¹² Employing the public nuisance doctrine in the mass torts context was unheard of until only a few decades ago.¹³ However, following a massive settlement with the tobacco industry in 1998, negotiated under the threat of such novel claims, states felt empowered to sue corporations like gun manufacturers and lead paint companies for their roles in creating widespread public harms.¹⁴ Most of the cases against lead paint manufacturers and distributors have failed, though for a variety of reasons.¹⁵ However, in November 2017, California’s Sixth Appellate Division upheld

6. *Blood Lead Levels in Children*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nceh/lead/prevention/blood-lead-levels.htm> [https://perma.cc/TB4J-WWVK] (last visited Nov. 12, 2019); *Lead Poisoning*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/lead-poisoning/symptoms-causes/syc-20354717> [https://perma.cc/K6L9-TTL9] (last visited Nov. 12, 2019).

7. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC RESPONSE TO ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION 1–5 (2012), https://www.cdc.gov/nceh/lead/acclpp/cdc_response_lead_exposure_recs.pdf [https://perma.cc/BB3N-F3MD].

8. *See Blood Lead Levels in Children*, *supra* note 6.

9. Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. § 1303 (2019).

10. *Protect Your Family from Exposures to Lead*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/lead/protect-your-family-exposures-lead> [https://perma.cc/245G-REBR] (last visited Nov. 12, 2019).

11. *Lead in Paint*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nceh/lead/prevention/sources/paint.htm> [https://perma.cc/4NRM-PC5M] (last visited Nov. 12, 2019).

12. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 770 (2003).

13. *Id.* at 743.

14. *Id.* at 743, 770.

15. *See infra* Part II.

key findings in *People v. ConAgra Grocery Products Co.*,¹⁶ in which ten counties prevailed under the public nuisance doctrine against three lead paint companies that had promoted the use of their products in the interiors of residential homes.¹⁷ The trial court ordered the defendants to pay \$1.15 billion in abatement costs,¹⁸ though the appellate court remanded for recalculation as it found the defendants liable for a shorter period.¹⁹ Both the California Supreme Court and the U.S. Supreme Court denied the defendants' writs of certiorari.²⁰ The parties ultimately reached a postjudgment settlement in which the defendants agreed to pay the ten counties a total of \$305 million, finally ending the nearly two-decades-long litigation.²¹

The *ConAgra* decision may encourage similar lawsuits in states that have yet to address whether lead paint companies can be held liable under the public nuisance doctrine, as well as other suits that would seek to employ the theory in new mass harm contexts.²² As the Chamber of Commerce stated in its amicus brief supporting *ConAgra* in the company's petition to the U.S. Supreme Court, "at least 80 new public nuisance cases of this sort have been filed by states and other government entities against American businesses, all seeking to impose sweeping liability based on similarly novel theories."²³ Considering that tort law is almost exclusively state law, one can expect an even greater number of cases to be filed in states, like California, whose highest courts have tended to be more plaintiff-friendly in nontraditional tort cases.²⁴ Indeed, only three months after *ConAgra*, the cities of San Francisco and Oakland filed a major public nuisance suit against five of the world's largest oil companies, claiming that they heavily marketed and sold fossil fuels despite their knowledge that the fuels contributed to global warming.²⁵ The two cities allege that they have suffered substantial harms, particularly coastal flooding, because of the defendants' actions over many decades.²⁶

16. 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

17. *Id.* at 514.

18. *Id.*

19. *Id.* at 598.

20. Press Release, James R. Williams, Cty. Counsel, Office of Cty. Counsel, California Counties and Cities Announce Groundbreaking \$305 Million Settlement of Landmark Lead Paint Litigation (July 17, 2019), <https://www.sccgov.org/sites/cco/leadpaint/Documents/July%2017%2c%202019%20Press%20Release%20-%20Settlement%20of%20Landmark%20Lead%20Paint%20Litigation.pdf> [<https://perma.cc/N4FE-AWZV>].

21. *Id.*

22. See Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Petitioners at 13–14, *ConAgra Grocery Prods. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84) [hereinafter Brief of Amicus Curiae Chamber of Commerce].

23. *Id.*

24. California has been a pioneer in tort law, especially where there is clearly a harm but it is difficult to hold defendants liable under traditional doctrines. See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (adopting market share liability); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (introducing a multifactor test to replace the traditional tripartite framework of premises liability).

25. *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at *1 (N.D. Cal. Feb. 27, 2018).

26. *Id.*

While the tort element of causation is notoriously elusive,²⁷ varies by jurisdiction, particularly between progressive and conservative states,²⁸ and is partly responsible for the disparate outcomes in these lead paint public nuisance claims,²⁹ there remains an even more fundamental question as to whether lead paint companies have infringed on a “public right.”³⁰ Under the public nuisance doctrine, the plaintiff must demonstrate that the defendant unreasonably interfered “with a right common to the general public.”³¹ Rhode Island characterized this component as the sine qua non of any public nuisance claim, for, without it, the suit can only be brought as a private action.³² California in *ConAgra* clearly found that the public had a right to be free from lead paint in their homes as it interfered with their access to essential community resources;³³ Rhode Island found the exact opposite.³⁴ Two other states—Illinois and Missouri—denied relief without expressly deciding whether a public right exists, as they found the claims insufficient on the basis of causation.³⁵ Finally, Wisconsin allowed a jury to answer the question, which it did in the affirmative,³⁶ while New Jersey simply accepted that a public right did exist because of a state statute declaring residential lead paint a public nuisance.³⁷ However, in both states, the plaintiffs yet again failed.³⁸ Across these six states, there now exists a wide range of both approaches and outcomes, including on the threshold requirement of the existence of a public right.

This Note explores whether the public has a common right to be free from lead paint in their homes and whether communities should be able to recover abatement funds through nuisance claims. Part I discusses the evolution of public nuisance from English common law through its historical applications in American jurisprudence. This Part continues by discussing its relatively recent use in mass torts, with a particular emphasis on what constitutes a common right. This Part then concludes by discussing the hazards of residential lead paint, examining why many states have employed the public nuisance doctrine against lead paint companies in an attempt to spread abatement costs.

27. Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1737 (1985).

28. See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007) (explaining that the Missouri Supreme Court was unwilling to adopt a more flexible causation standard like California’s “substantial factor” test).

29. See *infra* Part II.B.

30. Just as most courts have done, this Note uses the terms “public right” and “common right” interchangeably.

31. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

32. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 447 (R.I. 2008).

33. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 552 (Ct. App. 2017).

34. *Lead Indus. Ass’n*, 951 A.2d at 453.

35. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 140 (Ill. App. Ct. 2005); *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 869, 879 (Ill. App. Ct. 2003); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116–17 (Mo. 2007).

36. *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 764 n.5 (Wis. Ct. App. 2008).

37. *In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007).

38. *Id.* at 505–06; *NL Indus.*, 762 N.W.2d at 784.

Part II reviews the case law of a number of states where courts have adjudicated lead paint public nuisance claims. It begins with an overview of the existing statutory landscape regarding lead paint abatement and then reviews the disparate analytical approaches employed by the courts of the six states and their divergent outcomes.

Finally, Part III proposes a solution to these inconsistencies that calls on future state courts to follow the approach taken by the Rhode Island Supreme Court in closely observing the tort's historical boundaries. This analysis should lead other states to find that pervasive lead paint in private homes, while harmful and unfortunate, does not infringe upon a right held in common by the public.

I. PUBLIC NUISANCE: FROM THE KING'S ROADS TO LEAD-BASED PAINT

To understand why states have lodged public nuisance suits against lead paint manufacturers, it is necessary to understand both the specific harm that governments have sought to abate and the development of the cause of action. Part I.A provides background on the hazards of lead-based paint and its stubborn persistence in residences today. Part I.B discusses the origins of nuisance actions, both private and public, at common law and the traditional application of public nuisance doctrine in the United States. Part I.C then analyzes how and why local governments and states began employing public nuisance in the mass tort context a few decades ago, including against lead paint manufacturers.

A. The Harms and Pervasiveness of Lead-Based Paint

Lead is an abundant, versatile heavy metal that mankind has employed for millennia.³⁹ Since those earliest days, lead has been detrimental to human health. The first known cases of lead poisoning date back over 2300 years to the Roman Empire, when lead was commonly used in water pipes and pottery.⁴⁰ The problem became more prevalent during the Industrial Revolution as Western societies rapidly modernized and employed the metal in a vast array of new industries, like smelting and printing.⁴¹ With the advent of the automobile and lead-based gasoline in the early twentieth century, the presence of lead became ubiquitous.⁴² By the 1970s, the federal government finally recognized the serious health risks associated with lead exposure and took affirmative steps to reduce its use, including banning lead-based paint and leaded gasoline.⁴³ While undoubtedly positive steps, the

39. Shilu Tong et al., *Environmental Lead Exposure: A Public Health Problem of Global Dimensions*, 78 BULLETIN OF THE WORLD HEALTH ORGANIZATION [WHO] 1068, 1068–69 (2000), [https://www.who.int/bulletin/archives/78\(9\)1068.pdf](https://www.who.int/bulletin/archives/78(9)1068.pdf) [https://perma.cc/NCF9-DURK].

40. *Id.* at 1068.

41. *Id.*

42. *Id.* at 1069.

43. See Lead-Based Paint Poisoning Prevention Act, Pub. L. No. 100-572, 84 Stat. 2078 (1971) (codified as amended in scattered sections of 42 U.S.C.).

bans came more than a century and a half after the scientific community recognized the dangers of lead, and almost a century after some European countries first implemented regulations to prevent lead poisoning.⁴⁴

Despite the actions taken decades ago, lead poisoning remains a major public health issue today.⁴⁵ Common sources of lead include paint that has not been removed from older homes; soil, especially near industrial facilities that operate with lead; and lead pipes in water distribution systems.⁴⁶ Less common sources include folk medicines, lead ammunition in firearms, and inexpensive toys or jewelry from underdeveloped countries.⁴⁷ Dust is the most common means of lead exposure and is often created when lead paint deteriorates inside a residence, or from lead particles that are disturbed in the soil.⁴⁸ Individuals can also ingest lead particles through the air or water.⁴⁹ For example, Flint, Michigan experienced a water crisis in 2014 and 2015 when it began drawing water from a new source without using proper corrosion control.⁵⁰ Lacking a critical protective chemical, when the water flowed to homes through the city's antiquated lead pipes, it slowly ate away at the pipes, causing lead particles to be deposited into the water.⁵¹ In some instances, lead levels were hundreds of times higher than the government's minimum safety levels.⁵² The catastrophe led Michigan to declare a state of emergency and activate its national guard to assist in distributing bottled water to residents.⁵³ However, significant havoc had already been wreaked. One study found that the crisis led to a nearly 70 percent increase in the number of children under the age of five with blood levels greater than the CDC's reference value.⁵⁴

The symptoms of lead poisoning generally do not become apparent until a person has already accumulated high levels of lead in her blood.⁵⁵ In adults, elevated lead levels and lead poisoning can cause a variety of symptoms including high blood pressure, mood disorders, and memory impairment.⁵⁶ For those seeking to conceive, excessive lead levels can reduce sperm count

44. Tong et al., *supra* note 39, at 1068.

45. *Id.* at 1073.

46. *Sources of Lead*, N.Y. ST. DEP'T HEALTH, <https://www.health.ny.gov/environmental/lead/sources.htm> [<https://perma.cc/3KLQ-GTK6>] (last visited Nov. 12, 2019).

47. *Id.*

48. *Id.*

49. *Id.*

50. Terese M. Olson et al., *Forensic Estimates of Lead Release from Lead Service Lines During the Water Crisis in Flint, Michigan*, 4 ENVTL. SCI. & TECH. LETTERS 356, 356 (2017).

51. *Id.*

52. *Id.* (noting that the Environmental Protection Agency's "action level" is 15 micrograms per liter and that some findings in Flint exceeded 5000 micrograms per liter).

53. *State of Emergency Declared in the City of Flint*, CITY FLINT MICH., <https://www.cityofflint.com/state-of-emergency> [<https://perma.cc/BMC8-77ZU>] (last visited Nov. 12, 2019).

54. Hernán F. Gómez et al., *Blood Lead Levels of Children in Flint, Michigan: 2006–2016*, 197 J. PEDIATRICS 158, 160 (2018) (providing quantitative data indicating that 3.7 percent of this demographic had elevated blood levels in 2016 compared to 2.2 percent in 2014).

55. *Lead Poisoning*, *supra* note 6.

56. *Id.*

or create abnormal sperm in men and can increase the chances of a miscarriage or stillbirth in women.⁵⁷ In Flint, two researchers noted a 12 percent decrease in the fertility rate, a 58 percent increase in the fetal death rate, and an overall decrease in health of newborns in the city as compared to the rest of the state during the time of the water crisis.⁵⁸

While the effects of lead poisoning in adults are serious, the hazards for children are even more pressing as their bodies are still developing, therefore posing potentially lifelong consequences.⁵⁹ The American Academy of Pediatrics notes that lead exposure can damage a child's nervous system, bring about behavior problems, and stunt cognitive development.⁶⁰ Specifically, children exposed to high concentrations of lead are much more likely to have "impaired verbal concept formation, poor grammatical reasoning, and poor command following."⁶¹ Researchers have also noted an inverse relationship between blood lead levels and childhood IQ scores.⁶² Not only are the harms in children more pronounced, children are also much more susceptible than adults to lead poisoning from lead-based paint. As the appellate court in *ConAgra* reiterated from the evidence presented at trial, children "explore their environment with typical hand-to-mouth contact behavior" and learn quickly that "lead paint chips 'taste sweet.'"⁶³ Indeed, many of the earliest cases of childhood lead poisoning in the United States occurred when infants ingested flakes from the paint that lined their cribs.⁶⁴ During a Wisconsin trial in which the City of Milwaukee brought a public nuisance suit against a number of manufacturers, one expert witness testified that the first known case of childhood lead paint poisoning dates back to 1914.⁶⁵ In that instance, a young child suffered from seizures and fell into a coma after ingesting chunks of lead paint from his crib.⁶⁶ More than a

57. *Id.*

58. Daniel S. Grossman & David J. G. Slusky, *The Effect of an Increase in Lead in the Water System on Fertility and Birth Outcomes: The Case of Flint, Michigan* 1 (W. Va. Univ. Dep't of Econ., Working Paper No. 17-25, Aug. 7, 2017), https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1017&context=econ_working-papers [<https://perma.cc/PCT2-FXW9>].

59. Jaime Raymond & Mary Jean Brown, *Childhood Blood Levels in Children Aged <5 Years—United States, 2009–2014*, MORBIDITY & MORTALITY WKLY. REP., Jan. 20, 2017, at 1, 1, <https://www.cdc.gov/mmwr/volumes/66/ss/pdfs/ss6603.pdf> [<https://perma.cc/8W77-WFL7>].

60. *Lead Exposure in Children*, AM. ACAD. PEDIATRICS, <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/lead-exposure/Pages/Lead-Exposure-in-Children.aspx> [<https://perma.cc/BB9H-32M9>] (last visited Nov. 12, 2019).

61. Lisa H. Mason et al., *Pb Neurotoxicity: Neuropsychological Effects of Lead Toxicity*, BIOMED RES. INT'L, Jan. 2014, at 1, 4.

62. Gómez et al., *supra* note 54, at 158.

63. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 515 (Ct. App. 2017). See generally Scott Clark et al., *Urban Lead Exposures of Children in Cincinnati, Ohio*, 26 CHEMICAL SPECIATION & BIOAVAILABILITY 163 (1991).

64. *ConAgra*, 227 Cal Rptr. 3d at 519–20.

65. *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 763 (Wis. Ct. App. 2008).

66. *Id.*

century later, hand-to-mouth ingestion of lead paint chips is still the leading cause of childhood lead poisoning.⁶⁷

The government's initiatives to reduce the presence of lead beginning in the late 1970s had definitive and positive effects, especially for those most at risk.⁶⁸ In its most recent multiyear study conducted across approximately thirty jurisdictions, the CDC found encouraging data that average blood lead levels in children continue to decline.⁶⁹ However, the hazards presented by lead have not been eradicated. The same CDC report noted at least 75,000 confirmed cases of elevated blood lead levels in children under the age of five in a single year.⁷⁰ Given that the agency does not collect statistics from every state, in addition to complexities stemming from disparate approaches to screening and reporting in each state, one group of researchers has suggested that the CDC may only be capturing half of the actual number of children with elevated blood lead levels.⁷¹ Whatever the exact number, it is clear that lead continues to pose serious health risks for tens of thousands of young children today.⁷²

The Environmental Protection Agency warns those who live in a home built prior to 1978 that there is a "good chance" it contains lead paint.⁷³ Specifically, the agency estimates that 24 percent of homes constructed between 1960 and 1977, 69 percent constructed between 1940 and 1959, and 87 percent constructed before 1940 still contain lead paint.⁷⁴ According to a 2011 study by the Department of Housing and Urban Development, this equates to approximately 37 million homes, of which more than 23 million contain lead paint in a deteriorated, dangerous condition.⁷⁵ Of the nearly 16.8 million households that have a child younger than the age of six, 21 percent, or 3.6 million total, contain serious lead hazards.⁷⁶ Less affluent households, including those receiving government aid, are "significantly more likely" to have lead hazards than affluent households.⁷⁷

One of the main reasons why lead paint continues to be so prevalent, despite having been banned nearly fifty years ago, is the high cost of

67. Raymond & Brown, *supra* note 59, at 6.

68. *Id.* at 6–7.

69. *Id.* at 6.

70. *Id.*

71. Eric M. Roberts et al., *Assessing Child Lead Poisoning Case Ascertainment in the US, 1999–2010*, PEDIATRICS, May 2017, at 1, 1.

72. See *At-Risk Populations*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nceh/lead/prevention/populations.htm> [<https://perma.cc/BEA4-P7AA>] (last visited Nov. 12, 2019).

73. See *Protect Your Family from Exposures to Lead*, *supra* note 10.

74. *Id.*

75. U.S. DEP'T OF HOUS. & URBAN DEV., AMERICAN HEALTHY HOMES SURVEY: LEAD AND ARSENIC FINDINGS, at ES-1 (2011), https://www.hud.gov/sites/documents/AHHS_REPORT.PDF [<https://perma.cc/WKE8-LKNC>].

76. *Id.* at ES-2.

77. *Id.*

removal.⁷⁸ To avoid removal costs, many homeowners choose instead to mitigate the risk by applying an encapsulant over the old lead paint to prevent it from deteriorating.⁷⁹ These concerns about the costs of abatement and who should bear them lie at the heart of the divide over whether public nuisance law is a proper vehicle for communities seeking redress for the pervasive presence of lead paint.⁸⁰

B. Public Nuisance at Common Law and Historically in the United States

Public nuisance claims had not been lodged in the mass tort context until relatively recently.⁸¹ Part I.B.1 provides a general overview of both the private and public nuisance doctrines, including the requisite “common right” element for the latter type of claim. Part I.B.2 then discusses the historical evolution of public nuisance and some prototypical cases to help define the tort’s traditional boundaries in American jurisprudence.

1. Absence of Precise Definitions

In its simplest form, nuisance is not simply conduct or a condition, but instead an “invasion of an interest” held by private individuals or by the greater community.⁸² Developed as an outgrowth of the assize of disseisin in the thirteenth century,⁸³ nuisance could be brought through one of three actions: the assize of nuisance, the writ of nuisance, or criminal presentments.⁸⁴ The line between civil and criminal was not clear, which is unsurprising as early common law was notoriously ambiguous about the difference between public and private wrongs.⁸⁵ Regardless of whether the law originally treated it as a tort or a crime, nuisance was a necessary development in the early English legal system in that it filled the gap between disseisin, which protected against the wrongful dispossession of land, and trespass, which protected against the physical incursion of land.⁸⁶ The initial differences are, however, important in the development of the modern distinction between public and private nuisance. The latter tracks generally from the assize and writ of nuisance, while the former largely arose from

78. See Order re: Recalculation of Abatement Fund at 5–6, *People v. Atl. Richfield Co.*, No. 1-00-CV-788657 (Cal. Super. Ct. Sept. 4, 2018) (estimating the average cost of remediation at \$1500–\$3000 per house).

79. *Encapsulants: A Technique to Control Lead Paint Hazards*, N.Y. ST. DEP’T HEALTH (Mar. 2018), https://www.health.ny.gov/environmental/lead/renovation_repair_painting/encapsulants.htm [<https://perma.cc/K2ZN-WB8B>].

80. See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 118 (Mo. 2007) (Wolff, C.J., dissenting); *In re Lead Paint Litig.*, 924 A.2d 484, 511–12 (N.J. 2007) (Zazzali, C.J., dissenting).

81. Gifford, *supra* note 12, at 741.

82. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1004 (1966).

83. See DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 98 (2006); see also Prosser, *supra* note 82, at 997.

84. IBBETSON, *supra* note 83, at 99–101.

85. See *id.* at 1–2, 101.

86. See Prosser, *supra* note 82, at 997.

what were once considered criminal nuisances.⁸⁷ Private nuisance was primarily concerned with protecting the property rights of an individual whereas public nuisance concerned behavior that was of an “antisocial” nature.⁸⁸

American jurisdictions have provided some clarity to the doctrine by introducing a number of necessary elements to both private and public nuisance.⁸⁹ The Restatement (Second) of Torts defines public nuisance as “an unreasonable interference with a right common to the general public.”⁹⁰ Private nuisance, on the other hand, is “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”⁹¹ A key distinction, therefore, is whether the right being disturbed belongs collectively to the community, or instead to an individual alone. Only those whose rights are infringed by the nuisance may sue under the private nuisance doctrine.⁹² However, as a public right belongs to the community, either an individual alone, an individual representing the general public, or the sovereign itself may bring suit.⁹³ An individual can seek abatement of the nuisance but must demonstrate a harm greater than the rest of the community to recover damages.⁹⁴ A sovereign may only seek an abatement of the nuisance and not damages.⁹⁵ In these latter situations, however, the line between “abatement” and “damages” can become hotly contested.⁹⁶

While these distinctions help to establish the boundary between public and private nuisances, defining a nuisance remains an ambiguous task. As one treatise notes, “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people . . . from an alarming advertisement to a cockroach baked in pie.”⁹⁷ Indeed, the rise of public nuisance claims in the context of mass tort litigation is inextricably linked with the tort’s amorphous boundaries.⁹⁸ Whether defined by statute or case law, nuisance at common law and today is difficult to refine beyond the Latin maxim at its English roots: “*Sic utere tuo ut alienum non laedas*—‘So use your own property as not to injure another’s.’”⁹⁹

The difficulty of defining a “public right,” which is of course a necessary element of a public nuisance claim, further complicates the act of defining a

87. See IBBETSON, *supra* note 83, at 99–101, 106.

88. *Id.* at 106.

89. See RESTATEMENT (SECOND) OF TORTS §§ 821B, 821D (AM. LAW INST. 1979).

90. *Id.* § 821B.

91. *Id.* § 821D.

92. *Id.* § 821E.

93. *Id.* § 821C(2).

94. *Id.* § 821C(1).

95. *Id.* § 821C(2).

96. See, e.g., *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 568 (Ct. App. 2017) (explaining that the \$1.15 billion judgment constituted an abatement fund and not traditional damages).

97. W. PAGE KEETON ET AL., PROSSER & KEATON ON TORTS 616 (5th ed. 1984).

98. See Gifford, *supra* note 12, at 743.

99. IBBETSON, *supra* note 83, at 106.

public nuisance.¹⁰⁰ The Restatement identifies five categories of public rights: public health, safety, peace, comfort, and convenience.¹⁰¹ It further explains that “[a] public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”¹⁰² The categories offered in the Restatement, however, offer only the broadest boundaries of what specifically can constitute a public right. Certain common rights, such as the rights to clean air and navigable waterways and roadways, are indisputable.¹⁰³

However, the task of defining a common right becomes more difficult when applying the concept to a situation not foreseen by the common law. For example, lead paint is an indisputable health hazard, especially to children.¹⁰⁴ Its pervasive presence in residential homes is also uncontested.¹⁰⁵ One could logically conclude that a major health risk, present throughout a substantial portion of the community, is an issue of public health, and that as such, homes free of lead paint should be seen as a “public right.” Yet, as explored in Part II, most state courts are unwilling to codify this right without clear statutory guidance.¹⁰⁶ This twofold difficulty in both defining what constitutes a common right for a public nuisance claim and what qualifies as a nuisance of either kind led one state supreme court to describe nuisance as a tort that “elude[s] precise definition.”¹⁰⁷

2. Traditional Public Nuisance Claims

Public nuisances were initially considered crimes against the crown.¹⁰⁸ This is perhaps because the doctrine was first employed in suits to protect property that was used by all but owned by the monarch, such as the king’s highways, or because of the fear that a public nuisance could easily lead to a disturbance of the peace, including by those who would seek to rectify the nuisance without the assistance of the law.¹⁰⁹ The first statute known to address public nuisances, enacted in 1389, stated, “If anyone cast dung etc. into Ditches, Water etc. which are next to any City, Borough or Town, he who will may sue forth a writ directed unto the Mayor or Sheriff or Bayliff of such Town etc.”¹¹⁰ The City of London similarly prohibited acts such as burning improper fuels, putting waste in the streets, and maintaining animals to the irritation of others.¹¹¹ Other examples of public nuisances included

100. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

101. *Id.* § 821B(2)(a).

102. *Id.* § 821B cmt. g.

103. *See id.*

104. *See supra* Part I.A.

105. *See supra* Part I.A.

106. *See discussion infra* Part II.

107. *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 164 (Ill. 1982).

108. Prosser, *supra* note 82, at 998.

109. William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 28, 33, 36 (1948).

110. *Id.* at 35.

111. IBBETSON, *supra* note 83, at 101.

lotteries, “smoke from a lime-pit,” interfering with a market, diverting water from a mill, and even “unlicensed stage-plays.”¹¹² With the exception of the plays and lotteries, such actions almost certainly would be considered public nuisances in most American jurisdictions today.¹¹³

Most states have adopted statutes defining public nuisances and providing a cause of action for those affected.¹¹⁴ These statutes largely mirror concepts of public nuisance as developed at English common law. California, for example, codified a public nuisance right of action in its civil code in 1872.¹¹⁵ The statute defines nuisance as “[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.”¹¹⁶ A public nuisance specifically is something that “affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”¹¹⁷ The statutes of other states are very similar in that they sketch the boundaries of public nuisance broadly.¹¹⁸

In addition to these general definitions of nuisance, some states have gone one step further in declaring certain specific conditions, actions, or harms as public nuisances.¹¹⁹ Most of these statutes reflect the traditional conceptions of the tort, for example, by declaring whorehouses,¹²⁰ obstructions to public paths,¹²¹ and the locations of illicit drug distribution to be public nuisances.¹²² This statutory approach of broadly defining public nuisance and perhaps deeming certain specific conditions as public nuisances is a reflection of the tort’s evolution in American jurisprudence, as it has come to be used as a means of rectifying both harms considered proactively as well as those not specifically proscribed but nonetheless in need of abatement.¹²³

Until the 1970s, public nuisance claims brought under either the common law or broad nuisance statutes in American courts largely mirrored situations considered by the English centuries ago. For example, in 1899, a New York appellate court ruled in favor of a plaintiff who brought a public nuisance claim seeking damages for injuries sustained to his wagon that occurred as a

112. Prosser, *supra* note 82, at 998.

113. See RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (AM. LAW INST. 1979).

114. See *id.* § 821 cmt. c.

115. CAL. CIV. CODE § 3480 (West 2019).

116. *Id.* § 3479.

117. *Id.* § 3480.

118. See, e.g., MINN. STAT. § 609.74 (2019); MONT. CODE ANN. § 45-8-111 (2019).

119. See, e.g., COLO. REV. STAT. §§ 16-13-301 to 16-13-306 (2019) (providing an example of a statute with precise definitions and classes of public nuisance).

120. See, e.g., 740 ILL. COMP. STAT. 105/1 (2019); UTAH CODE ANN. § 47-1-1 (LexisNexis 2019).

121. See, e.g., ARIZ. REV. STAT. ANN. § 13-2917(A)(2) (2019); OKLA. STAT. tit. 50, § 1 (2019).

122. See, e.g., CONN. GEN. STAT. § 19a-343(c)(4) (2019); DEL. CODE ANN. tit. 10, § 7102(a)(3) (2019).

123. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 546 (2006).

result of the defendant leaving logs in a road for at least five days.¹²⁴ The court explained that obstructing a public highway was an obvious public nuisance and that the failure of the defendant to mitigate the problem in a reasonable period of time made him liable to anyone “suffering special damage.”¹²⁵ This case is a perfect example of the ability of private citizens to bring public nuisance actions and seek damages when they suffer a harm greater than the rest of the community¹²⁶ and reflects the origins of the public nuisance doctrine.¹²⁷

More common than an individual bringing a public nuisance claim, however, is when a public entity brings suit to abate a nuisance. In 1903, for example, Yuba County, California sued Kate Hayes Mining Company seeking to enjoin the defendant from continuing to dump minerals from its mine into a local creek and river.¹²⁸ The county prevailed at trial by proving that mineral deposits were collecting and causing the water beds to rise, thereby making flooding more frequent and more destructive.¹²⁹ The California Supreme Court affirmed the injunction, finding that the defendant’s conduct clearly constituted a public nuisance as it placed a substantial amount of property at risk of ruin should the dumping continue unabated.¹³⁰

Communities have also used public nuisance claims to abate activities in breach of the public’s contemporary standards of decency and morality. In 1947, the Florida Supreme Court upheld a trial court’s decision to prohibit the Ha Ha Club, a local night club, from continuing performances that were allegedly conducted in a “nasty, suggestive and indecent manner.”¹³¹ The club’s performances included acts by men impersonating women, as well as skits and jokes that were “lewd, indecent, [and] obscene.”¹³² The Florida Supreme Court took the opportunity to wax poetic about the value of the public nuisance doctrine: “There is no greater impediment to mass virtue than a ration of filth This is the theory on which laws for the abatement of nuisances of this kind are promulgated and enforced.”¹³³ The court had no difficulty finding that the salacious activity breached the community’s standards of morality, and as such, constituted a public nuisance that was proper for abatement.¹³⁴

The three cases above are typical of public nuisance claims historically brought in the United States.¹³⁵ Each involved the infringement of a cognizable common right, whether that of public convenience, public safety,

124. *See generally* *Lawton v. Olmstead*, 58 N.Y.S. 36 (App. Div. 1899).

125. *Id.* at 37.

126. *See* RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. LAW INST. 1979).

127. *See* Prosser, *supra* note 82, at 998.

128. *Yuba County v. Kate Hayes Mining Co.*, 74 P. 1049, 1050 (Cal. 1903).

129. *Id.*

130. *Id.*

131. *Fed. Amusement Co. v. State ex rel. Tuppen*, 32 So. 2d 1, 2 (Fla. 1947).

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. LAW INST. 1979).

or public morals. A clear link from the nuisance to the harm suffered provided relief in the form of damages or abatement, the latter of which was limited to mitigating an obvious harm in a specific location. The relative simplicity of these traditional public nuisance suits would disappear as public entities began to employ the theory in new contexts nearly fifty years ago.¹³⁶ Harms were not as clear and took longer to manifest,¹³⁷ narrow geographic boundaries became a secondary issue,¹³⁸ and the key question of whether a public right even existed became hotly contested.¹³⁹

C. Public Nuisance in Mass Torts

The tort of public nuisance has awakened from a centuries-long slumber. Traditionally regarded as “a species of catch-all low grade criminal offense” and as part of “the great grab bag, the dust bin, of the law,” public nuisance has emerged during the past several years as a conspicuous weapon—albeit with inconsistent results—in the arsenal of states and municipalities.¹⁴⁰

Until only a few decades ago, American public nuisance cases reflected those found historically in English common law. However, in the 1970s and ’80s, plaintiffs’ attorneys began to push the traditional boundaries of nuisance, as the tort was vaguely defined and provided a means of avoiding potentially fatal shortcomings of other torts, such as statutes of limitations and the inability to recover for purely economic losses.¹⁴¹ While the results of this strategy were mixed, the use of public nuisance doctrine in mass torts is unlikely to cease anytime soon.¹⁴² Whether as a means of addressing the opioid crisis,¹⁴³ gun violence, or the hazards of lead paint, states and communities have come to view public nuisance as an avenue of resolving serious social health and safety issues.¹⁴⁴

136. See Thomas W. Merrill, *Is Public Nuisance a Tort?*, J. TORT L., Oct. 2011, at ii, 1.

137. See Gifford, *supra* note 12, at 754–55 (discussing early suits against the tobacco industry when the harms of smoking were not yet known); see also *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 131–32 (Ill. App. Ct. 2005) (noting that lead paint becomes dangerous only once it begins to deteriorate).

138. See Merrill, *supra* note 136, at 1–2 (discussing attempts to employ public nuisance in global warming litigation); see also, e.g., *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at *3 n.2 (N.D. Cal. Feb. 27, 2018) (highlighting the reliance by San Francisco and Oakland on the *ConAgra* decision in their ongoing global warming public nuisance suit against oil companies).

139. *Compare* *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 552 (Ct. App. 2017) (finding that the public holds a common right to be free of lead paint in their private residences), *with* *State v. Lead Indus. Ass’n*, 951 A.2d 428, 453 (R.I. 2008) (“Absent from the state’s complaint is any allegation that defendants have interfered with a public right as that term long has been understood in the law of public nuisance.”).

140. Gifford, *supra* note 12, at 743 (quoting Prosser, *supra* note 82, at 999).

141. *Id.* at 749; Merrill, *supra* note 136, at 1–2.

142. See, e.g., Brief of Amicus Curiae Chamber of Commerce, *supra* note 22, at 13–14.

143. See Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html> [https://perma.cc/5TET-UBHY].

144. See Gifford, *supra* note 12, at 835–36.

One of the earliest mass harm public nuisance suits was lodged by a single plaintiff who sought to represent more than seven million citizens of Los Angeles County against hundreds of defendants allegedly emitting harmful pollutants into the atmosphere.¹⁴⁵ In affirming the dismissal of the case in 1971, the California appellate court noted that “[t]he plaintiff has paid the court an extravagant compliment in asking it to supersede the legislative and administrative regulation in this critical area, but the trial judge showed the greater wisdom in declining the tender.”¹⁴⁶ The case is an outlier in that it attempted to solve a massive social problem and was lodged by an individual, not a public entity.¹⁴⁷ More common in this early stage of the development of modern public nuisance law were attempts by communities to recover from asbestos manufacturers the costs associated with removing the harmful product from schools and other public facilities.¹⁴⁸ These cases, too, were unsuccessful, often because the court was unwilling to allow the plaintiffs to use nuisance as an end run around products liability law.¹⁴⁹

Tobacco litigation took a slightly different path in that public nuisance claims brought by states evolved as the product of decades of unsuccessful suits by individuals.¹⁵⁰ In 1994, the attorney general of Mississippi filed an action against the tobacco industry that included a public nuisance claim.¹⁵¹ Within three years, forty other states filed similar cases, many of which included the novel theory of public nuisance.¹⁵² It is by no means clear that these claims would have succeeded at trial. Seeking to avoid potentially devastating judgments, the tobacco industry instead settled with the states to the tune of \$206 billion.¹⁵³ Thus, while never adjudicated, the tobacco litigation was nevertheless a “formative period” for the public nuisance doctrine, as public entities came to understand the broad scope of the tort and its potential power over massive industries in combating serious public policy issues.¹⁵⁴

Since the settlement with the tobacco industry, cities and states have lodged public nuisance claims against a variety of other industries that have somehow contributed to mass public harm.¹⁵⁵ These include suits against gun manufacturers for their role in America’s endemic gun violence,¹⁵⁶ oil

145. *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 641 (Ct. App. 1971).

146. *Id.* at 646.

147. Gifford, *supra* note 12, at 750.

148. *Id.* at 750–52.

149. *Id.*

150. *Id.* at 753–56.

151. *Id.* at 759.

152. *Id.* at 759–60.

153. *See id.* at 759–60, 762.

154. *Id.* at 764–65 (quoting David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1172–73 (2000)).

155. *See Merrill, supra* note 136, at 2.

156. *See, e.g., City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 886 (E.D. Pa. 2000), *aff’d*, 277 F.3d 415 (3d Cir. 2003); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1105 (Ill. 2004); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1140 (Ohio 2002).

companies for their contributions to global warming,¹⁵⁷ and pharmaceutical companies for their role in the opioid crisis.¹⁵⁸ The first major trial in this latter context recently resulted in a judgment against Johnson & Johnson for \$572 million.¹⁵⁹ And for the past two decades, local and state governments have filed major public nuisance suits against lead paint manufacturers in six different states. The respective state courts have employed different approaches to adjudicate these cases, particularly on the existence of a common right, that expectedly has led to unequal results.¹⁶⁰

II. A COMMON RIGHT TO LIVE IN LEAD-FREE HOMES?

State courts have had difficulty defining the boundaries of public nuisance in new contexts,¹⁶¹ which has unsurprisingly led to “strikingly inconsistent conclusions” across the country when novel public nuisance claims arise.¹⁶² Those inconsistencies are apparent both on the issue of whether the presence of lead-based paint in private residences infringes upon a common right and on the method by which respective courts have answered that question.¹⁶³ Part II.A discusses federal and state legislative attempts to mitigate the harms of lead paint. Part II.B reviews those state courts that avoided answering the question of whether a public right existed because of the plaintiffs’ inability to satisfy the causation element of the claim. Part II.C analyzes the disparate decisions of courts that adjudicated claims primarily by relying on the common law and broad statutory definitions of nuisance. Finally, Part II.D discusses a single case wherein the court relied heavily on a specific state lead paint statute to resolve the issue.

A. Federal and State Efforts to Mitigate

Recognizing the serious risks to public health posed by lead poisoning, the federal government and most state governments have passed legislation seeking to combat the presence of lead paint in American homes. Congress passed the first federal legislation, the Lead-Based Paint Poisoning Prevention Act¹⁶⁴ (LBPPPA) in 1971 and expanded it two decades later with passage of the Residential Lead-Based Paint Hazard Reduction Act of

157. See, e.g., *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018); *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at *1 (N.D. Cal. Feb. 27, 2018).

158. See, e.g., *In re Nat’l Prescription Opiate Litig.*, No. 1:17-cv-02804, 2018 WL 6628898, at *12 (N.D. Ohio Dec. 19, 2018); *Mayor of Baltimore v. Purdue Pharma L.P.*, No. GLR-18-800, 2018 WL 1963816, at *1 (D. Md. Apr. 25, 2018).

159. See Hoffman, *supra* note 143.

160. See *infra* Parts II.B–D.

161. See Gifford, *supra* note 12, at 747–48.

162. *Id.* at 748.

163. See *infra* Parts II.B–D.

164. Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified as amended in scattered sections of 42 U.S.C.).

1992¹⁶⁵ (RLPHRA). The LBPPPA provided grants to study the effects of lead exposure from a variety of sources, including paint, and also directed the secretary of the Department of Housing and Urban Development to promulgate regulations to mitigate the harms of lead paint in federal housing.¹⁶⁶ Only a few years later, the Consumer Product Safety Commission, convinced of the serious harms of lead-based paint, banned the product, effective February 1978.¹⁶⁷ The RLPHRA further shifted the federal government's policy from mitigation to elimination of lead paint hazards¹⁶⁸ by directing multiple agencies to develop comprehensive plans for greater public awareness. Efforts included mandatory disclosures during sales of houses with lead paint, better inspection and risk assessment programs, and abatement plans for eradicating lead paint.¹⁶⁹

Following the example set by the federal government, nearly every state passed legislation aimed at combating the serious risks of lead.¹⁷⁰ When New Jersey's legislature passed its Lead Paint Act, it noted that lead poisoning was "the most prevalent environmental health problem facing children in [the state]."¹⁷¹ Similarly, the Rhode Island Supreme Court noted in its public nuisance opinion that the state's capital is pejoratively nicknamed "'the lead paint capital' because of its disproportionately large number" of childhood lead cases.¹⁷² Most states,¹⁷³ including all of those whose courts have adjudicated lead paint public nuisance claims,¹⁷⁴ require that when a proper public entity, such as the local health department, finds hazardous lead conditions on a property, its owner is responsible for abating the risks.¹⁷⁵ However, the courts of these states have varied in how great an

165. Pub. L. No. 102-550, tit. X, 106 Stat. 3897 (codified as amended in scattered sections of the U.S.C.).

166. *In re Lead Paint Litig.*, 924 A.2d 484, 491 (N.J. 2007).

167. Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. § 1303 (2019).

168. 42 U.S.C. § 4851a (2012).

169. *Id.* §§ 4852b–4852d.

170. See *Lead Hazards Project*, NAT'L CONF. ST. LEGISLATURES (Nov. 29, 2017), <http://www.ncsl.org/research/environment-and-natural-resources/lead-hazards-project.aspx> [<https://perma.cc/QG48-KFNF>] (compiling lead paint statutes from forty-four states and the District of Columbia).

171. N.J. STAT. ANN. § 26:2Q-1 (West 2019).

172. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 436 (R.I. 2008).

173. *Lead Hazards Project*, *supra* note 170.

174. CAL. HEALTH & SAFETY CODE § 105256 (West 2019); 410 ILL. COMP. STAT. 45/9 (2019); MO. REV. STAT. § 701.308 (2019); N.J. STAT. ANN. § 24:14A-8 (West 2019); 23 R.I. GEN. LAWS § 23-24.6-23 (2019); WIS. STAT. § 254.166 (2019).

175. See, e.g., 410 ILL. COMP. STAT. 45/9 (2019) ("(1) If the inspection report identifies a lead hazard, the Department or delegate agency shall serve a mitigation notice on the property owner that the owner is required to mitigate the lead hazard, and shall indicate the time period specified in this Section in which the owner must complete the mitigation. The notice shall include information describing mitigation activities which meet the requirements of this Act. (2) If the inspection report identifies a lead hazard, the owner shall mitigate the lead hazard in a manner prescribed by the Department and within the time limit prescribed by this Section."); N.J. STAT. ANN. § 24:14A-8 (West 2019) ("When the board of health having primary jurisdiction hereunder finds that there is a lead-based paint hazard on the interior walls, ceilings, doors, floors, baseboards or window sills and frames of any dwelling or any exterior

emphasis they place on these statutes with respect to lead paint compared to general statutes defining public nuisance and the common law of nuisance.¹⁷⁶

B. Skirting the Difficult Question

Courts in two states avoided clarifying the threshold issue of whether lead paint in homes interferes with a common right by instead finding that the plaintiffs failed on the element of causation. Part II.B.1 discusses two cases from Illinois and Part II.B.2 reviews the single lead paint public nuisance suit from Missouri.

1. Illinois

In the early 2000s, appellate courts in Illinois reviewed two cases involving public nuisance claims against lead paint manufacturers and trade associations.¹⁷⁷ In the first action, *Lewis v. Lead Industries Ass'n*,¹⁷⁸ three plaintiffs sought to represent a class of all children in the state exposed to lead paint for damages arising from “the costs of all medical screenings, assessments, and monitoring.”¹⁷⁹ In the second, *City of Chicago v. American Cyanamid Co.*,¹⁸⁰ the state’s largest city brought suit as a public entity seeking abatement of the pervasive lead paint in its homes.¹⁸¹ In both instances, the trial court dismissed the case at the pleadings stage and the appellate court affirmed.¹⁸² On the narrow issue of the existence of a common right, the courts took slightly different approaches to reach the same conclusion.¹⁸³

In the putative class action, the appellate court simply recognized that the plaintiffs had sufficiently alleged the existence of a public right.¹⁸⁴ Specifically, it accepted without any analysis the allegation that the promotion, manufacturing, and distribution of lead-based paint “exposed all children in [the] state to the risk of lead poisoning,” thus infringing on the common rights of public health and safety, two of the five categories of common rights highlighted by the Restatement.¹⁸⁵ However, the court affirmed the dismissal of the public nuisance claim because the plaintiffs

surface that is readily accessible to children and further finds a person occupying or using such dwelling is an unequivocal case of lead poisoning or at high risk of lead intoxication as defined by department regulation it shall at once notify the owner that he is maintaining a public nuisance and order him to remediate the nuisance . . .”).

176. See *infra* Parts II.B–D.

177. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 869 (Ill. App. Ct. 2003).

178. 793 N.E.2d 869 (Ill. App. Ct. 2003).

179. *Id.* at 871.

180. 823 N.E.2d 126 (Ill. App. Ct. 2005).

181. *Id.* at 128–29.

182. *Id.* at 128; *Lewis*, 793 N.E.2d at 875.

183. See *Am. Cyanamid Co.*, 823 N.E.2d at 131–32; *Lewis*, 793 N.E.2d at 877–78.

184. *Lewis*, 793 N.E.2d at 878.

185. *Id.*; RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (AM. LAW INST. 1979).

failed to identify the specific defendants who caused the distinct harm to each plaintiff—a critical requirement for the causation element of the claim.¹⁸⁶

The fact that the court did not challenge the existence of a common right, and specifically affixed it to categories discussed in the Restatement, may have seemed promising to future plaintiffs, with the important caveat that the case was only in the pleadings stage.¹⁸⁷ Only two years later, another division of the same appellate district reviewed the City of Chicago's nuisance claim against lead paint manufacturers.¹⁸⁸ This time, however, the court would offer more on the issue of common rights given that, in the interim, the Illinois Supreme Court had issued a major ruling in another public nuisance case. In *City of Chicago v. Beretta U.S.A. Corp.*,¹⁸⁹ the city, again as plaintiff, filed a nuisance claim against gun manufacturers for their contributions to the city's pervasive violence.¹⁹⁰ The Illinois Supreme Court began by declaring the elements required of a public nuisance claim: (1) a public right, (2) a substantial and unreasonable interference of that right, (3) proximately caused by the defendant, and (4) which inflicted injury.¹⁹¹ As to the critical threshold issue of what constitutes a common right, the court accepted the Restatement's broad categories.¹⁹² However, while the court acknowledged that the public has a general right to safety and peace, relying on the state's precedent in nuisance cases, it was unwilling to recognize that gun manufacturers had infringed on that right by lawfully selling weapons.¹⁹³ In carefully crafting the definition of the asserted common right in controversy, the court was "reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another."¹⁹⁴ Undergirding its decision was a policy concern that such recognition would constitute an "unprecedented expansion of the concept of public rights," a common retort among courts in lead paint nuisance claims.¹⁹⁵

Instead of simply accepting the plaintiff's allegation that a public right existed, the appellate court, hearing Chicago's appeal in *American Cyanamid Co.*, engaged in a more searching inquiry.¹⁹⁶ Relying on the Restatement, state law precedent, and *Beretta*, the court doubted whether the plaintiff sufficiently pled this first critical element.¹⁹⁷ While it acknowledged that public nuisances can be present on multiple private properties, it seemed to

186. *Lewis*, 793 N.E.2d at 878.

187. *Id.* at 871.

188. *See generally Am. Cyanamid Co.*, 823 N.E.2d 126.

189. 821 N.E.2d 1099 (Ill. 2004).

190. *Id.* at 1105–06.

191. *Id.* at 1113.

192. *See id.* at 1114 (recognizing rights common to the public to include "the rights of public health, public safety, public peace, public comfort, and public convenience").

193. *Id.* at 1114–16.

194. *Id.* at 1116.

195. *See id.*; *see also infra* Parts II.C.2–D.

196. *See City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 131–32 (Ill. App. Ct. 2005).

197. *Id.* at 132.

accept the defendants' argument that lead paint only becomes a hazard when it deteriorates—a condition within the control of individual property owners and therefore outside of the scope of traditional public rights such as highways, waterways, and clean air.¹⁹⁸

Nevertheless, the court avoided definitively ruling on the common right issue.¹⁹⁹ Instead, it assumed the existence of a public right and affirmed the lower court's dismissal given that the plaintiff did not sufficiently allege factual causation.²⁰⁰ As in *Lewis*, the plaintiff's inability to satisfy traditional but-for causation was fatal.²⁰¹ Importantly, the court also declined the city's attempts to overcome this hurdle by accepting an alternative approach to causation, such as market share liability.²⁰²

While the Illinois courts have not ruled authoritatively on whether lead paint in homes infringes upon a public right, there is clearly skepticism, especially following the state supreme court's decision in *Beretta*.²⁰³ More important, however, is the process by which the two courts approached the issue. In each instance, the courts relied almost exclusively on the Restatement and state precedent.²⁰⁴ Interestingly, neither court looked to Illinois' Lead Poisoning Prevention Act²⁰⁵ or its public nuisance statute²⁰⁶ to guide its analysis.²⁰⁷ Instead, both courts skirted the issue by focusing on the element of factual causation and concluding that the plaintiffs could not succeed under the state's traditional but-for standard.²⁰⁸

2. Missouri

In January 2000, the City of St. Louis filed an action against numerous lead paint manufacturers asserting eight tort claims, including one for public nuisance.²⁰⁹ The city alleged that it was among the top ten U.S. cities in number of children suffering from elevated blood levels and that the problem persisted because more than 90 percent of all homes in the city were constructed prior to the federal government's ban on lead paint.²¹⁰ The city

198. *See id.* at 132–33.

199. *Id.* at 133.

200. *Id.*

201. *See id.*; *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869, 878 (Ill. App. Ct. 2003).

202. *Am. Cyanamid Co.*, 823 N.E.2d at 134.

203. *Id.* at 132–33.

204. *Id.* at 130–33; *Lewis*, 793 N.E.2d at 877–78.

205. 410 ILL. COMP. STAT. 45/1 to 45/17 (2019).

206. 720 ILL. COMP. STAT. 5/47-5 (2019).

207. Both courts cited a single provision of the statute, but only to note that the plaintiffs cited it in their respective arguments. *See Am. Cyanamid Co.*, 823 N.E.2d at 132; *Lewis*, 793 N.E.2d at 874–75. At the end of its opinion in *American Cyanamid Co.*, the court also mentioned that property owners are required by law to remediate deteriorated lead paint; however, this did not factor into its analysis of whether a public right exists. *See Am. Cyanamid Co.*, 823 N.E.2d at 139.

208. *Am. Cyanamid Co.*, 823 N.E.2d at 139–40; *Lewis*, 793 N.E.2d at 878–79.

209. Brief of Appellants at 11, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (No. ED87702), 2006 WL 2029789, at *11.

210. *Id.* at *10–11.

sought compensation for previous and future abatement efforts.²¹¹ After the trial court granted the defendants' summary judgment motion, the city appealed.²¹²

The Missouri Supreme Court narrowly rejected the public nuisance claim by a 4-3 vote.²¹³ As with the Illinois appellate courts in *Lewis* and *American Cyanamid Co.*, the court found that the city failed to allege sufficient facts to satisfy actual causation.²¹⁴ Relying heavily on one of its decisions from the mid-1980s²¹⁵ in which it rejected alternative standards of actual causation for products liability claims arising out of the use of diethylstilbestrol (DES), the majority took the opportunity to reemphasize that Missouri would not adopt a more malleable causation standard as proposed by the city and as adopted by jurisdictions like California.²¹⁶

The court's focus on causation muddled the answer as to whether it believed a public right existed in the first place.²¹⁷ The majority's only substantive discussion of public nuisance doctrine was to note that the city's claim actually appeared to be a private tort action seeking recovery for cleanup costs.²¹⁸ As noted earlier, while private parties may recover damages through a public nuisance action, public entities may only seek abatement.²¹⁹ However, aside from this distinction, the majority did not discuss the public nuisance doctrine any further.²²⁰ As with the courts in Illinois, it looked neither to the state's Lead Abatement and Prevention of Lead Poisoning Act²²¹ nor its public nuisance statutes²²² to aid its analysis. The simple fact that the city could not satisfy traditional but-for causation allowed the court to avoid the deeper questions about public nuisance and common rights.²²³

Three justices of the Missouri Supreme Court dissented.²²⁴ Chief Justice Michael Wolff, who authored the dissenting opinion, argued that requiring

211. *Id.* at *9–10.

212. The appeal was first heard by the Missouri Court of Appeals and then transferred to the Missouri Supreme Court. *See City of St. Louis v. Benjamin Moore & Co.*, No. ED 87702, 2006 WL 3780785, at *5 (Mo. Ct. App. 2006).

213. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 117 (Mo. 2007).

214. *Id.* at 114; *see supra* Part II.B.1.

215. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984).

216. *See Benjamin Moore & Co.*, 226 S.W.3d at 115–16 (citing *Zafft*, in which the Missouri Supreme Court rejected the doctrine of market share liability introduced by the California Supreme Court in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980)). For an important source of the California Supreme Court's decision in *Sindell*, see Naomi Sheiner, Note, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

217. *See Benjamin Moore & Co.*, 226 S.W.3d at 113–14.

218. *Id.* at 116.

219. *See supra* notes 93–95 and accompanying text.

220. *See Benjamin Moore & Co.*, 226 S.W.3d at 113–14.

221. MO. REV. STAT. §§ 701.300–701.349 (2019).

222. Missouri's public nuisance statutes are scattered throughout its state code and are generally tied to a specific type of nuisance. *See, e.g.*, MO. REV. STAT. § 311.740 (2019) (public nuisance law related to alcoholic beverages); MO. REV. STAT. § 579.105 (2019) (public nuisance law related to controlled substances).

223. *See Benjamin Moore & Co.*, 226 S.W.3d at 116–17.

224. *Id.* at 117 (Wolff, C.J., dissenting).

the city to identify the specific defendant whose product was used in each particular residence defied the purpose of the public nuisance doctrine.²²⁵ Drawing on an analogy embedded in the common law conception of public nuisance, Wolff struggled to see how the defendants' conduct in selling a hazardous product that continued to inflict harm was different from a group of defendants dumping toxic sludge into a stream.²²⁶ The community-wide harm suffered because of the defendants' conduct should have only required plaintiffs to identify the lead paint manufacturers that contributed to that harm, not to engage in a case-by-case identification of which defendants' products were used in which homes.²²⁷ Such a high bar for causation in public nuisance cases, Wolff feared, would transform the tort into a mass harm class action in which members would still be required to prove individual injury.²²⁸

Chief Justice Wolff also raised arguably the most important policy consideration underlying the entire claim and others like it, a point largely ignored by both the majority and the Illinois courts.²²⁹ Cities such as St. Louis had and were continuing to expend substantial sums of money²³⁰ to mitigate the hazard of residential lead paint, a problem that they did not create.²³¹ In his eyes, such a costly decision was undoubtedly worthwhile, as cities could not "continue having the brains of many of its children permanently dulled by lead poisoning."²³² But should cities not have an avenue for recovering those expenditures?²³³ While the chief justice viewed the judiciary, and specifically the public nuisance doctrine, as a means to

225. *Id.* at 117–18.

226. *Id.*

227. *Id.* at 117–19.

228. *Id.* at 119.

229. *Id.* at 116 (majority opinion) (acknowledging only the city's remediation efforts in "certain, albeit numerous, properties"). Neither *American Cyanamid Co.* nor *Lewis* discusses the substantial cost borne by cities for lead remediation programs. See generally *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869 (Ill. App. Ct. 2003).

230. See, e.g., CITY OF MILWAUKEE HEALTH DEP'T, CHILDHOOD LEAD POISONING PREVENTION PROGRAM: ASSESSMENT OF OPERATIONS AND RECOMMENDATIONS FOR CORRECTIVE ACTIONS 18–19 (2018), <https://localtvwiti.files.wordpress.com/2018/01/mhd-lead-report-1-29-18.pdf> [<https://perma.cc/R5ZF-BMYR>] (demonstrating that the City of Milwaukee has spent between \$3 and \$6 million per year from 2005 to 2018 on lead abatement efforts); *City of St. Louis Earns Grant to Continue Lead Remediation*, OFF. MAYOR ST. LOUIS (Nov. 3, 2014), <https://www.stlouis-mo.gov/government/departments/mayor/news/city-earns-grant-to-continue-lead-remediation.cfm> [<https://perma.cc/Y2K8-WYJQ>] (explaining that the City of St. Louis spends approximately \$3 million per year on lead paint remediation); Michael Hawthorne, *Lead Paint Poisons Poor Chicago Kids as City Spends Millions Less on Cleanup*, CHI. TRIB. (May 1, 2015), <https://www.chicagotribune.com/news/ct-lead-poisoning-chicago-met-20150501-story.html> [<https://perma.cc/BE8S-WTYL>] (revealing that the City of Chicago has spent between \$4 million and \$8 million each year in lead paint abatement programs over the past decade).

231. *Benjamin Moore & Co.*, 226 S.W.3d at 118 (Wolff, C.J., dissenting).

232. *Id.*

233. See *id.* at 118–19.

provide relief, at least two other state supreme courts have explicitly rejected such a responsibility as outside of the scope of their authority.²³⁴

C. Proceeding on the Common Law

Contrary to the approach taken by Illinois and Missouri, the courts of three other states actually answered whether there exists a public right to be free of lead paint in homes by relying on the common law and broad public nuisance conceptions.²³⁵ Part II.C.1 discusses the intricate history of lead paint cases in Wisconsin as well as the recent California judgment in *ConAgra*. In both states, the plaintiffs prevailed on the existence of a public right.²³⁶ Part II.C.2 analyzes how the Rhode Island Supreme Court found that no public right exists and that the amorphous boundaries of public nuisance could not replace clear legislative guidance on a major public policy issue.²³⁷ Furthermore, it explores how the court rejected the proposition that pervasive lead paint in private homes could constitute an infringement of a public right as conceived in the public nuisance doctrine.²³⁸

1. Public Right Found

In a series of cases in Wisconsin and California, public entities were successful in their arguments that lead paint in private homes infringed upon a common right.²³⁹ In the former, the plaintiffs still ultimately failed on their public nuisance claim,²⁴⁰ while, in the latter, the plaintiffs succeeded and did so with a substantial judgment in their favor.²⁴¹

a. Wisconsin

Of the six states in which public entities brought public nuisance claims against lead paint companies, Wisconsin's case history demonstrates the greatest interplay between the courts and the legislature. There, plaintiffs came close to prevailing on their public nuisance claims given that the courts crafted a flexible definition of the tort.²⁴² However, concerned with the policy implications of using public nuisance doctrine in place of products liability and negligence actions, especially against manufacturers for

234. See *infra* Parts II.C.2, II.D.

235. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 552 (Ct. App. 2017); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 447–48 (R.I. 2008); *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 767–77 (Wis. Ct. App. 2008); *City of Milwaukee v. NL Indus.*, 691 N.W.2d 888, 891–92 (Wis. Ct. App. 2004).

236. *ConAgra*, 227 Cal. Rptr. 3d at 552; *NL Indus.*, 762 N.W.2d at 764 n.5.

237. *Lead Indus. Ass'n*, 951 A.2d at 435–36.

238. *Id.* at 452–53.

239. *ConAgra*, 227 Cal. Rptr. 3d at 552; *NL Indus.*, 762 N.W.2d at 764 n.5.

240. *NL Indus.*, 762 N.W.2d at 761–62.

241. *ConAgra*, 227 Cal. Rptr. 3d at 514, 598.

242. *NL Indus.*, 691 N.W.2d at 891–92.

decades-old, once-legal activities, the legislature stepped in to eradicate any chance that other plaintiffs could succeed in the future.²⁴³

The litigation began in 2001 when the City of Milwaukee filed numerous claims, including a public nuisance action, against two lead paint manufacturers for their role in creating a public health hazard.²⁴⁴ The city alleged that, in the few years preceding the filing of the case, almost 20,000 children had suffered from lead paint poisoning.²⁴⁵ That translated into an average of 16 percent of children across the entire city, including 26.4 percent in its urban areas and up to 63 percent in the most heavily impacted areas.²⁴⁶ The trial judge granted the defendants' motion for summary judgment of the public nuisance claim given the plaintiff's inability to satisfy causation; the city appealed.²⁴⁷

The Wisconsin Court of Appeals disagreed with the trial court, finding that there were genuine disputes of material fact.²⁴⁸ While most of its opinion focused on causation, the court also defined the necessary elements of a public nuisance claim, something which had been lacking in the state's jurisprudence.²⁴⁹ Yet, on the issue of a common right, the court offered little guidance.²⁵⁰ For example, it recited a list of factors from a previous case that could be used in evaluating whether an activity or condition constituted a nuisance, the last of which was "the degree or character of the injury inflicted or right impinged upon."²⁵¹ However, nowhere in the opinion did the court explain what constituted a public right. Instead, the court held that the general question of the existence of a public nuisance, which inherently incorporates the existence of some public right, was one for the jury.²⁵²

On remand, the parties proceeded to trial, during which the city presented evidence substantially similar to what would be successful years later in *ConAgra*.²⁵³ The jury found in a special verdict that while the presence of lead paint in homes across Milwaukee was a public nuisance, specifically because of the health hazards to children, the defendants were not the legal cause of the nuisance.²⁵⁴ Again, the city appealed, claiming a number of errors in jury instructions; however, the appellate court affirmed the trial decision.²⁵⁵ Given the basis of the appeal, the court again did not provide any further clarity on the appropriateness of lead paint public nuisance claims

243. WIS. STAT. § 895.046 (2019).

244. *NL Indus.*, 691 N.W.2d at 891–92.

245. Brief of Appellant at 5, *City of Milwaukee v. NL Indus.*, 691 N.W.2d 888 (Wis. Ct. App. 2004) (No. 03-2786), 2003 WL 25257400, at *5.

246. *Id.*

247. *NL Indus.*, 691 N.W.2d at 890.

248. *Id.* at 893–94.

249. *Id.* at 892.

250. *See id.* at 891–92.

251. *Id.* at 891.

252. *See id.* at 895.

253. *See City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 762–67 (Wis. Ct. App. 2008); *see also People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 526–45 (Ct. App. 2017).

254. *NL Indus.*, 762 N.W.2d at 764 n.5, 767.

255. *Id.* at 761–62.

nor on the more narrow issue of common rights as a necessary element of such claims.²⁵⁶

At the same time that the suit by the City of Milwaukee bounced between the trial and appellate courts, another lead paint case made its way to the Wisconsin Supreme Court. In September 1999, J. Steven Thomas, by his guardian ad litem, filed a negligence suit against his landlords and multiple lead paint manufacturers for serious developmental issues arising from his ingestion of paint chips as an infant.²⁵⁷ However, as evidenced by the public nuisance cases brought by St. Louis and Chicago, the inability to satisfy traditional but-for causation was potentially fatal to his claim.²⁵⁸ Drawing on the solution crafted for a parallel problem in the DES litigation of the 1980s, the Wisconsin high court decided to extend the risk contribution theory to lead paint cases, thereby alleviating plaintiffs of the burden of identifying specific manufacturers.²⁵⁹

The Wisconsin legislature, however, was displeased with the ruling, viewing it as an “improperly expansive application of the risk contribution theory of liability.”²⁶⁰ A few years after the decision, and under a new governor, the legislature passed a law that seriously curtailed the breadth of the risk contribution theory and eliminated it as an alternative to but-for causation in lead paint cases.²⁶¹ Among the legislature’s greatest concerns were the social and economic consequences of imposing liability on companies for once-legal activities undertaken decades ago,²⁶² a common retort among state courts that denied relief in public nuisance claims.²⁶³ Therefore, while primarily focused on the element of causation, the new law also imposed a twenty-five-year statute of limitations for a variety of claims against lead paint manufacturers, distributors, and promoters, including claims for public and private nuisance.²⁶⁴ Given that the statute of limitations ran from the product’s date of sale,²⁶⁵ and because the federal government had banned lead paint more than twenty-five years earlier in 1978,²⁶⁶ the law effectively immunized former lead paint companies from liability and prevented any further claims against them.

The history of lead paint litigation and the legislative response in Wisconsin offers two potential takeaways for navigating the current disparate

256. *Id.* at 757.

257. *Thomas v. Mallet*, 701 N.W.2d 523, 528–31 (Wis. 2005).

258. *See supra* Part II.B.

259. *Mallet*, 701 N.W.2d at 527.

260. WIS. STAT. § 895.046 (2019).

261. *See id.*; *see also* Timothy D. Edwards & Jessica E. Ozalp, *A New Era: Products Liability Law in Wisconsin*, WIS. LAW. (July 2011), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=84&Issue=7&ArticleID=2050> [<https://perma.cc/TBM7-JNXX>].

262. WIS. STAT. § 895.046 (2019).

263. *See, e.g.*, *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 132 (Ill. App. Ct. 2005); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 452–55 (R.I. 2008).

264. WIS. STAT. § 895.046 (2019).

265. *Id.*

266. Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. § 1303 (2019).

landscape of lead paint public nuisance cases. First, one potential solution to resolve the existence of a common right is to simply ask the jury whether a public nuisance exists,²⁶⁷ as answering so affirmatively inherently requires also finding the existence of a common right.²⁶⁸ This approach, however, is uncommon, as in every other state this threshold question is one for the court.²⁶⁹ It also deprives courts in public nuisance suits of their historic “gatekeeper” role meant to ensure that the tort is not used improperly.²⁷⁰ Second, state legislatures can, and perhaps should, decide whether or not to extend public nuisance doctrine to include lead paint claims.²⁷¹ Legislatures are better suited to balance costs and benefits on social issues than are courts.²⁷² Clear statutory guidance would also provide the judiciary greater clarity in adjudicating claims of such an amorphous tort.²⁷³ However, while such legislative action would be helpful, it is important to remember that public nuisance is a valuable remedy precisely because it can be employed to rectify harms not considered by the legislature.²⁷⁴

b. California

Of all the lead paint public nuisance cases across the country, in only one did the plaintiffs succeed both on the existence of a common right and on the overall nuisance claim.²⁷⁵ Initially filed in 2000, *People v. ConAgra Grocery Products Co.*²⁷⁶ had a lengthy and complex history, with opinions at all three levels of the California judiciary over almost two decades.²⁷⁷ In its final form, the case involved ten plaintiffs, all California counties, that lodged a single claim of public nuisance against five former manufacturers of lead paint.²⁷⁸ Judge James Kleinberg of the Superior Court of Santa Clara County presided over a bench trial that lasted for six weeks in the summer of 2013.²⁷⁹ On January 7, 2014, he issued a 114-page decision in which he found three of the five companies liable for creating a public nuisance by promoting the sale of lead-based paint and ordered them to pay \$1.15 billion in abatement

267. See, e.g., *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 764 n.5 (Wis. Ct. App. 2008).

268. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

269. See, e.g., *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 551–52 (Ct. App. 2017); *In re Lead Paint Litig.*, 924 A.2d 484, 500–01 (N.J. 2007); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 453–54 (R.I. 2008).

270. See Part II.C.1.ii; see also Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 872 (2001).

271. Merrill, *supra* note 136, at 4–5.

272. *Id.* at 32; see also *Lead Indus. Ass’n*, 951 A.2d at 435–36.

273. Merrill, *supra* note 136, at 29–30.

274. See Schwartz & Goldberg, *supra* note 123, at 546.

275. See *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 514, 593–94 (Ct. App. 2017).

276. *Id.* at 499.

277. *Id.* at 525 n.22.

278. *People v. Atl. Richfield Co.*, No. 1-00-CV-788657, 2014 WL 1385823, at *2–3, *5 (Cal. Super. Ct. Mar. 26, 2014).

279. *Id.* at *1.

funds.²⁸⁰ Three years later, the Sixth Appellate District largely affirmed the ruling, although it did order a recalculation of the abatement funds;²⁸¹ both the Supreme Court of California²⁸² and the Supreme Court of the United States denied certiorari.²⁸³ On remand in September 2018, the trial court reduced the total abatement payment from \$1.15 billion to \$409 million.²⁸⁴ Finally, in July 2019, the parties reached a postjudgment settlement of \$305 million,²⁸⁵ which, while only a quarter of the original award, is not insubstantial.

At both the trial and appellate levels, each court accepted that the public possessed a common right to be free of lead-based paint in their homes.²⁸⁶ However, neither court, despite decisions of considerable length, spent much space discussing the critical threshold issue.²⁸⁷ Both relied exclusively on the state's public nuisance statute²⁸⁸ to easily find that the public did indeed possess a common right to be free of lead paint in their homes.²⁸⁹ The flexible definition of a common right in the statute allowed the trial court to characterize the public right at issue as one "to be free from the harmful effects of lead in paint."²⁹⁰ The appellate court described the common right more broadly, adding that pervasive lead paint "threatens the public right to essential community resources," specifically residential housing and associated resources "like water, electricity, natural gas, and sewer services."²⁹¹

The tort of public nuisance is purposefully broad to protect against harms that cannot be proscribed proactively.²⁹² As such, the doctrine affords the judiciary substantial discretion in adjudicating public nuisance claims,²⁹³ including the element of a common right.²⁹⁴ That discretion has traditionally been tempered in American jurisprudence as courts have employed a strict gatekeeping role.²⁹⁵ However, the defendants in *ConAgra* charged that both the California trial and appellate courts failed to exercise that responsibility.²⁹⁶ In reaching their conclusion that the public possessed a common right to be free of lead paint in their homes, neither court looked to

280. *Id.* at *61–62.

281. *ConAgra*, 227 Cal. Rptr. 3d at 598.

282. Petition for Writ of Certiorari at 3–4, *ConAgra Grocery Prods. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84).

283. *ConAgra Grocery Prods. Co. v. California*, 139 S. Ct. 377 (2018) (mem.).

284. *See supra* note 78.

285. Press Release, James R. Williams, *supra* note 20.

286. *ConAgra*, 227 Cal. Rptr. 3d at 551–52.

287. *See id.*; *People v. Atl. Richfield Co.*, No. 1-00-CV-788657, 2014 WL 1385823, at *5–6, 8 (Cal. Super. Ct. Mar. 26, 2014).

288. *See* CAL. CIV. CODE §§ 3479–3480 (West 2019).

289. *ConAgra*, 227 Cal. Rptr. 3d at 551–52; *Atl. Richfield Co.*, 2014 WL 1385823, at *8.

290. *Atl. Richfield Co.*, 2014 WL 1385823, at *8.

291. *ConAgra*, 227 Cal. Rptr. 3d at 552.

292. Schwartz & Goldberg, *supra* note 123, at 546.

293. *See* Antolini, *supra* note 270, at 773–74.

294. *Id.* at 771–72.

295. *See id.* at 776.

296. *See* Petition for Writ of Certiorari, *supra* note 282, at 1–2.

the broader history of the tort nor the traditional kinds of common rights protected under the public nuisance doctrine.²⁹⁷ By relying exclusively on a broadly worded statute, the courts found a public right not traditionally conceived by the doctrine.²⁹⁸ While the public has a common right against interference with their collective health, the lead paint was pervasive in private homes, not public buildings or public housing, and was put there by individual homeowners.²⁹⁹ The Restatement³⁰⁰ and numerous courts have warned that the aggregation of individual harms cannot equate to the interference of a common right,³⁰¹ which is arguably what the California courts found.³⁰²

Some scholars are concerned that *ConAgra* will invite public entities to wield the public nuisance doctrine as a powerful weapon against businesses.³⁰³ Already, two California cities have cited the case in their public nuisance suit against oil companies for their contribution to global warming.³⁰⁴ Even more worrisome, these scholars fear *ConAgra*'s broad conception of common rights, if followed, would mean "the concept of a public nuisance claim would be subject to no meaningful restriction and would swallow virtually all tort law."³⁰⁵ Though it is only a single case, a recent judgment for the state of Oklahoma against Johnson & Johnson for its role in the opioid crisis lends some credence to these warnings.³⁰⁶

For their part, the plaintiffs in *ConAgra* argued that these concerns are unfounded.³⁰⁷ First, they argue that the case will not promote a flood of new litigation, as the underlying basis for the decision was laid in 2006 and there had been no spike in public nuisance suits since.³⁰⁸ Second, while they acknowledged that public nuisance is conceived broadly, especially in California, public nuisance also has a number of safeguards to prevent it from becoming abused, primarily that suits are brought by politically accountable officials who can only seek equitable abatement, not damages.³⁰⁹ Though diametrically opposed in their predictions, neither the plaintiffs nor the

297. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 551–52 (Ct. App. 2017); *People v. Atl. Richfield Co.*, No. 1-00-CV-788657, 2014 WL 1385823, at *8 (Cal. Super. Ct. Mar. 26, 2014).

298. Brief of Distinguished Legal Scholars as Amici Curiae in Support of Petitioners at 5–8, *ConAgra Grocery Prods. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84) [hereinafter Brief of Distinguished Legal Scholars].

299. *Id.* at 8.

300. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW INST. 1979).

301. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1115–16 (Ill. 2004); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 448 (R.I. 2008).

302. *See* Brief of Distinguished Legal Scholars, *supra* note 298, at 7–8.

303. *Id.* at 21.

304. *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at *3 n.2 (C.D. Cal. Feb. 27, 2018).

305. Brief of Distinguished Legal Scholars, *supra* note 298, at 7–8.

306. *See* Hoffman, *supra* note 143.

307. Brief in Opposition at 34–38, *ConAgra Grocery Prods. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84).

308. *Id.* at 35.

309. *Id.* at 36–37.

scholars are clairvoyants; the reality of a new legal landscape will likely not become apparent until more time has passed.

2. No Public Right Found (Rhode Island)

In 1999, the attorney general of Rhode Island initiated a public nuisance suit against multiple former lead paint manufacturers and a trade association that once promoted the product.³¹⁰ Seven years later, *State v. Lead Industries Ass'n*³¹¹ finally went to trial.³¹² In what would become the longest civil trial in the state's history, the jury returned a verdict for the state.³¹³ Two years thereafter, the Rhode Island Supreme Court reversed the judgment on a number of grounds, including in its finding that there is no common right of the public to live in lead-free homes.³¹⁴

Unlike other courts, the Rhode Island Supreme Court began with an expansive history of public nuisance and its origins in the English common law³¹⁵ and its evolution in the state's jurisprudence.³¹⁶ Recognizing that the common law must reflect societal changes, the court warned of revolutionary measures that would destroy carefully crafted legal principles.³¹⁷ Instead, the law should evolve "gradually and incrementally and usually in a direction that can be predicted."³¹⁸ With those cautionary words, the court then analyzed the elements of public nuisance claims under Rhode Island law.³¹⁹

On the threshold element of a public right, which it identified as the *sine qua non* of any public nuisance suit,³²⁰ the court reflected the same skepticism as the Illinois Supreme Court in *Beretta*.³²¹ Individualized harms in the aggregate cannot equate to the infringement of a common right as traditionally conceived under the public nuisance doctrine.³²² While mass injuries, like those arising from lead paint, affect a large number of individuals, public rights are more than simply the total of private harms.³²³ Instead, they are "indivisible" and shared by the entirety of society.³²⁴ Therefore, the state's argument that lead paint interfered with the health of

310. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 434 (R.I. 2008).

311. 951 A.2d 428 (R.I. 2008).

312. *Id.* at 434.

313. *Id.*

314. *Id.* at 453–54.

315. *Id.* at 443–44.

316. *Id.* at 445–46.

317. *Id.*

318. *Id.* at 445.

319. *Id.* at 447–57. Rhode Island adds a control element to its public nuisance claims. The defendants must have "control over the instrumentality alleged to have created the nuisance when the damage occurred." *Id.* at 446. Such a requirement means that nuisance claims can almost never be brought against a defendant for a harmful product. See Schwartz & Goldberg, *supra* note 123, at 567–68.

320. *Lead Indus. Ass'n*, 951 A.2d at 447.

321. See *id.* at 447–48, 454–55; see also *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114–16 (Ill. 2004).

322. *Lead Indus. Ass'n*, 951 A.2d at 448.

323. *Id.*

324. *Id.*

the general public, while factually true, was not legally sufficient for the purpose of a public nuisance claim.³²⁵ Citing the Restatement and nuisance cases from across the country, the court reflected a conception of public rights that mirrored that of its English common law origins.³²⁶ To hold that lead paint infringed upon some common right would be to create a right where none exists and, more concerning, would create a precedent that any mass harm could fall under the public nuisance doctrine.³²⁷ As no common right existed, the court held that the trial judge should have dismissed the suit from the outset.³²⁸ Of all the courts to adjudicate lead paint public nuisance claims, this focus on the critical threshold issue of the existence of a common right was arguably the most faithful to the common law and the most efficient approach in evaluating the novel claims.

The Rhode Island Supreme Court was conscientious throughout its opinion in repeatedly tempering expectations about the role of the judiciary in tackling social issues.³²⁹ While entirely sympathetic to the grave health problems still inflicted by lead paint,³³⁰ the court would not allow public nuisance to be stretched in such a manner as to upend the tort itself.³³¹ Doing so, the justices feared, “would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended.”³³² In the array of remedies available to both private citizens and public entities, the body of tort law requires that distinct torts remain separate and not subsume one another.³³³ To allow recovery, the court cautioned, would mean the creation of bad laws,³³⁴ something, it noted, Edmund Burke once warned constituted “the worst sort of tyranny.”³³⁵

D. Adjudicating Claims with Legislative Guidance (New Jersey)

Of all the lead paint cases brought under a public nuisance theory, the New Jersey Supreme Court’s 2007 decision in *In re Lead Paint Litigation*³³⁶ relied most heavily on the actions the state legislature had already taken to address the problem. The litigation began in 2001 when the City of Newark sued

325. *Id.* at 453.

326. *Id.* at 448 (“Rather, a public right is the right to a public good, such as ‘an indivisible resource shared by the public at large, like air, water, or public rights of way.’” (quoting *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 131 (Ill. App. Ct. 2005)); *see also supra* Part I.B.

327. *Lead Indus. Ass’n*, 951 A.2d at 454.

328. *Id.* at 453.

329. *See id.* at 435–36, 445–46, 480–81.

330. *Id.* at 435.

331. *Id.* at 453–54 (“The enormous leap that the state urges us to take is wholly inconsistent with the widely recognized principle that the evolution of the common law should occur gradually, predictably, and incrementally. Were we to hold otherwise, we would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals.”).

332. *Id.* at 453.

333. *See id.* at 445–57; *see also* Schwartz & Goldberg, *supra* note 123, at 579–80.

334. *Lead Indus. Ass’n*, 951 A.2d at 480–81.

335. *Id.* at 454.

336. 924 A.2d 484 (N.J. 2007).

multiple lead paint manufacturers on a variety of claims ranging from fraud and civil conspiracy to public nuisance.³³⁷ Twenty-five other cities, towns, and boroughs across the state brought their own similar suits shortly thereafter.³³⁸ A single transferee judge assigned to manage all of the cases granted the defendants' motion to dismiss, rejecting the plaintiffs' "proverbial Gordian Knot" of claims and characterizing their nuisance theory as being contrary to the state's statutes, constitution, and precedent.³³⁹ The appellate court reversed and remanded the public nuisance claims, finding that the trial judge erred in concluding that the state's lead paint statute precluded the communities from bringing a public nuisance claim against the defendants.³⁴⁰ Indeed, the court found that litigation may actually foster the same objectives as those pronounced by the legislature in providing another mechanism to abate lead paint in residences.³⁴¹ The New Jersey Supreme Court granted review explicitly to resolve uncertainties surrounding public nuisance actions.³⁴²

Similar to the Rhode Island Supreme Court,³⁴³ the New Jersey Supreme Court began by providing general background information on the theory of public nuisance and pronounced broad boundaries of the tort that mirrored those of the Restatement.³⁴⁴ The court then turned to one of the most contentious issues in the litigation: whether a state statute precluded, encouraged, or had no effect on the right of public entities to bring public nuisance suits.³⁴⁵ Specifically, the New Jersey legislature declared that lead paint in a hazardous state inside private homes constituted a public nuisance.³⁴⁶ While the court expressed doubts about whether the legislature's use of the term "public nuisance" meant that it also implied a common right against residential lead paint,³⁴⁷ it was clear that the legislature had already decided that abatement was the responsibility of individual homeowners.³⁴⁸ Further, the statute developed a comprehensive program to abate and eradicate lead paint from residences through the use of grants and low-interest loans funded, in part, by sales taxes on paint products.³⁴⁹ The

337. *Id.* at 486–87.

338. *Id.*

339. *In re Lead Paint*, No. MID-L-2754-01, 2002 WL 31474528, at *1, *23 (N.J. Super. Ct. Law Div. Nov. 4, 2002).

340. *In re Lead Paint Litig.*, No. A-1946-02T3, 2005 WL 1994172, at *5–6, *21 (N.J. Super. Ct. App. Div. Aug. 17, 2005).

341. *See id.* at *5–6.

342. *In re Lead Paint Litig.*, 924 A.2d at 489.

343. *See supra* Part II.C.

344. *In re Lead Paint Litig.*, 924 A.2d at 499; *see also* RESTATEMENT (SECOND) OF TORTS §§ 821B, 821C (AM. LAW INST. 1979).

345. *In re Lead Paint Litig.*, 924 A.2d at 499–502.

346. N.J. STAT. ANN. § 24:14A-5 (West 2019) ("The presence of lead paint upon the interior of any dwelling or upon any exterior surface that is readily accessible to children causing a hazard to the occupants or anyone coming in contact with such surfaces is hereby declared to be a public nuisance.").

347. *In re Lead Paint Litig.*, 924 A.2d at 501.

348. *Id.*; N.J. STAT. ANN. § 24:14A-8 (West 2019).

349. *In re Lead Paint Litig.*, 924 A.2d at 493–94.

plaintiffs argued that the legislative actions did not preclude a public nuisance claim.³⁵⁰ However, the majority, in a split decision, saw these efforts as dispositive.³⁵¹ In engaging in the inherently legislative function of allocating costs and developing a holistic approach to a serious social problem, the court remarked that the legislature did not intend “to sanction a tort-based theory of recovery.”³⁵²

Even in the absence of such legislation, the majority would have still found that the plaintiffs could not prevail on their public nuisance claim.³⁵³ First, the majority viewed the “abatement” sought by local communities as a mask for damages,³⁵⁴ a concern similar to that of the Missouri Supreme Court.³⁵⁵ Second, the majority saw the true underlying claim as one rooted in products liability, not public nuisance.³⁵⁶ Finally, as with the Rhode Island Supreme Court,³⁵⁷ the court warned that conflating distinct torts would have disastrous consequences for the entire body of tort law.³⁵⁸

Two justices disagreed with the majority’s conclusion.³⁵⁹ In his dissent, Chief Justice James Zazzali argued that the legislature’s actions on the important social problem did not preclude a public nuisance suit.³⁶⁰ In fact, the statute and the lawsuit together sought to tackle “the same evil.”³⁶¹ Tort law, he argued, was the mechanism by which private citizens, including through their elected officials, could seek corrective justice,³⁶² and it was the judiciary’s responsibility to ensure that it modernized with societal changes.³⁶³ On the threshold issue of a common right, however, he offered only that the public has a “right to be free from the harmful effects of lead paint.”³⁶⁴ Like Chief Justice Wolff in Missouri,³⁶⁵ Chief Justice Zazzali recognized that these lead paint public nuisance suits were truly about who should bear the costs of abatement.³⁶⁶ However, he did not explain further how the toxin in private homes violated some common right held by the public as a whole.³⁶⁷

350. *Id.* at 499.

351. *See id.* at 500.

352. *Id.*

353. *Id.* at 500–02.

354. *Id.* at 502.

355. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007).

356. *In re Lead Paint Litig.*, 924 A.2d at 503.

357. *See State v. Lead Indus. Ass’n*, 951 A.2d 428, 456–57 (R.I. 2008).

358. *In re Lead Paint Litig.*, 924 A.2d at 505.

359. *Id.* at 506, 512 (Zazzali, C.J., dissenting).

360. *Id.* at 508.

361. *Id.*

362. *Id.* at 511.

363. *Id.* at 506.

364. *Id.*

365. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 118–19 (Mo. 2007) (Wolff, C.J., dissenting).

366. *In re Lead Paint Litig.*, 924 A.2d at 511 (Zazzali, C.J., dissenting) (“The only impediment to purging New Jersey of lead paint is the financial cost. The majority’s holding unfairly places the cost of abatement on taxpayers and private property owners, while sheltering those responsible for creating the problem.”).

367. *Id.* at 506–12.

The majority in *In re Lead Paint Litigation* shared the fears of the Rhode Island Supreme Court.³⁶⁸ While sympathetic to the harms stemming from lead paint, it was concerned that allowing the public nuisance claim to proceed would “stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort.”³⁶⁹ And given its emphasis on acts by the state legislature to address the problem, of all the courts to adjudicate lead paint nuisance claims, it was most leery of the judiciary overstepping its boundaries.³⁷⁰

III. AVOIDING THE *CONAGRA* APPROACH TO PUBLIC NUISANCE

As the New Jersey chief justice explained in his dissent, lead paint public nuisance litigation is fundamentally about who should bear the costs of mitigating the serious health hazards of pervasive lead paint—manufacturers, or homeowners and taxpayers.³⁷¹ However, as the amicus brief in support of *ConAgra*’s petition to the Supreme Court warned, there is great fear among some in the legal community that stretching the traditional boundaries of the public nuisance doctrine to allow recovery will lead to an explosion of lawsuits that would upend the entirety of tort law.³⁷² The polar positions in many ways reflect the disparate analytical approaches and conclusions of the courts in the six states which have heard such cases, particularly on the issue of the existence of a common right.³⁷³ In adjudicating public nuisance cases in novel contexts, courts should follow the approach of the Rhode Island Supreme Court by carefully ensuring that the plaintiffs prove that the supposed nuisance is infringing upon a right truly held in common by the public.³⁷⁴ Part III.A argues that there is no common right to be free of lead paint in private residences. Part III.B posits that the solution for widespread social harms like pervasive lead paint should be the responsibility of legislatures, not the judiciary.

A. No Public Right to Lead-Free Homes Exists

ConAgra wrongfully created a common right where none exists. Pervasive lead paint, while harmful both individually and socially, does not infringe upon any right held collectively by the public under the public nuisance doctrine.³⁷⁵ To begin, the paint is present in private homes, not in any shared public space.³⁷⁶ While the presence of lead paint constitutes a substantial risk to the health of many individual members of the public, the aggregation of such potential harms does not necessarily infringe upon a right held by the

368. *Id.* at 494 (majority opinion); see *supra* notes 327–31 and accompanying text.

369. *In re Lead Paint Litig.*, 924 A.2d at 494.

370. *Id.* at 505; see also *supra* Parts II.B–C.

371. See *In re Lead Paint Litig.*, 924 A.2d at 511 (Zazzali, C.J., dissenting).

372. See Brief of Distinguished Legal Scholars, *supra* note 298, at 5–8.

373. See *supra* Part II.

374. See *supra* Part II.C.2.

375. See *supra* Part II.C.2.

376. See Brief of Distinguished Legal Scholars, *supra* note 298, at 7–8.

public collectively.³⁷⁷ If lead particles spread outside of the home and into the public space, as with smoke or dust, plaintiffs may then have a more compelling argument that the paint infringed upon a common right because the community shares a right to the air.³⁷⁸ Similarly, the poisoning of a well would infringe upon a common right to water, and the blocking of a roadway would interfere with the public's right of convenience.³⁷⁹ However, absent such a showing, pervasive lead paint contained within private homes does not violate an indivisible public right because the public possesses no collective right to health in their individual dwellings.³⁸⁰ To hold otherwise would be to create a public right against all harms, something the tort was never intended to do.³⁸¹

As no common right exists, public nuisance claims cannot be brought to abate residential lead paint.³⁸² While an attractive and novel theory, the public nuisance doctrine should not be employed in the place of other torts simply because it is the last available option.³⁸³ Individuals can still attempt to bring private nuisance actions on their own behalf or another tort claim like negligence or products liability if available. Public entities should preserve public nuisance to combat interferences with truly common rights, not as a vehicle for restitution of the costs of mitigating a social harm that arose from a once-legal product.³⁸⁴

Future state courts that adjudicate lead paint public nuisance suits should dismiss the claims from the outset, following the analysis set forth by the Rhode Island Supreme Court.³⁸⁵ The lack of a common right means that public nuisance is simply inapposite. Courts should state such a proposition directly, contrary to Illinois and Missouri,³⁸⁶ as doing so will provide structure to the often nebulous tort. Further, a trial judge should make this determination, not a jury.³⁸⁷ If there is no common right, there is no public nuisance and therefore no need to waste precious judicial resources on a trial. The value of the public nuisance doctrine is that it can be employed to combat social harms not considered or proscribed proactively;³⁸⁸ however, to preserve that value, courts cannot allow the tort to morph into a panacea that would swallow the carefully crafted evolution of tort law.³⁸⁹

377. *See id.* at 5–8.

378. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW INST. 1979); *see also* Brief of Distinguished Legal Scholars, *supra* note 298, at 8.

379. *See supra* Part I.B.

380. *See supra* Part II.C.2.

381. *See In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

382. *See supra* Part II.C.2.

383. *See supra* Part I.C.

384. *See supra* Parts II.C.2–D.

385. *See supra* Part II.C.2.

386. *See supra* Part II.B.

387. *See supra* Part II.B.2.

388. *See* Gifford, *supra* note 12, at 745.

389. *See In re Lead Paint Litig.*, 924 A.2d 484, 501–02 (N.J. 2007); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 456–57 (R.I. 2008).

B. Legislatures Are Better Suited to Tackle This Problem

Complex social issues should be resolved by legislatures, not by courts through the public nuisance doctrine.³⁹⁰ Pervasive lead-based paint in residential homes is one such issue. Nearly every state legislature has followed the federal government in passing laws to mitigate the risks of lead paint,³⁹¹ and continued efforts at eradicating the toxin should be within their exclusive control.³⁹² While Chief Justice Zazzali was correct that courts have a responsibility to modernize the common law,³⁹³ they also have a duty to ensure that existing law is not employed impermissibly.³⁹⁴ To allow recovery in public nuisance lead paint suits not only defies the boundaries of the tort but also places the court in the role of decision maker about the distribution costs on a major social issue, something which should be a legislative function.³⁹⁵

By and large, the majority of courts that have adjudicated public nuisance claims in the course of lead paint litigation have fulfilled their strict gatekeeper role³⁹⁶ and have not allowed the tort to stray from its English common law roots.³⁹⁷ Beginning with the first major public nuisance suit in 1971, which attempted to solve the problem of air pollution in Los Angeles, through the explosion of public nuisance suits in the last two decades,³⁹⁸ courts have generally resisted allowing public nuisance to become a vehicle by which to usurp the legislative branch.³⁹⁹ With the exception of *ConAgra*, lead paint public nuisance claims have rightly failed.⁴⁰⁰ As courts face public nuisance suits in new contexts—whether global warming, the opioid crisis, or some unforeseen mass harm—they should recall the wisdom of the Rhode Island Supreme Court in avoiding the siren call of public nuisance: “This Court is bound by the law and can provide justice only to the extent that law allows This Court is powerless to fashion independently a cause of action that would achieve the justice that these children deserve.”⁴⁰¹

CONCLUSION

Lead-based paint indisputably remains a significant health hazard in the United States. Despite a federal ban on the product almost half a century ago, hundreds of thousands of children still suffer from elevated levels of lead in their blood and millions more continue to live under such a threat.

390. *See supra* Part II.D.

391. *See supra* Part II.A.

392. *See supra* Part II.D.

393. *See In re Lead Paint Litig.*, 924 A.2d at 508 (Zazzali, C.J., dissenting).

394. *See Lead Indus. Ass’n*, 951 A.2d at 443–46.

395. *See Merrill*, *supra* note 136, at 4–5, 32; *see also Lead Indus. Ass’n*, 951 A.2d at 435–36.

396. *See supra* Part II.

397. *See Schwartz & Goldberg*, *supra* note 123, at 583.

398. *See supra* Part I.C.

399. *See supra* Part II.C.

400. *See supra* Part II.

401. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 436 (R.I. 2008).

Time-barred from products liability or negligence claims, numerous states have employed the public nuisance doctrine in attempts to hold lead paint companies liable for the persisting problem. With the exception of *ConAgra* in California, all of these attempts have failed—either because the courts refused to recognize that the actions of lead paint companies taken decades ago interfere with a public right today or because the plaintiffs failed to properly allege factual causation, thus allowing the courts to skirt any decision on the existence of a public right.

Recognizing that there are undoubtedly difficulties in defining the amorphous boundaries of a “common right” and that lead-based paint is an unfortunate pervasive harm, the tort of public nuisance is not the proper tool for communities to employ in their abatement efforts. As understood in the common law and through modern American jurisprudence, lead paint in private homes does not infringe upon any right commonly held by the public. Absent this threshold requirement, public nuisance claims must fail. Future courts that hear public nuisance suits of any nature should follow the example set by the Rhode Island Supreme Court in carefully analyzing the historical boundaries of the tort to ensure that it does not morph into a remedy for all harms.